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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 177.

JULES S. BACHE,
Appellant,
against

SAMUEL HUNT, as Receiver of the Toledo, St. Louis and Kansas City Railroad Company; and TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF ON BEHALF OF APPELLEES.

ADRIAN H. JOLINE,
CLARENCE BROWN,
Counsel for Appellees.

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16640

Supreme Court of the United States,

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Appellant,

vs.

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Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLEES.

This cause comes before the Court upon an appeal by Jules S. Bache from an order of the Circuit Court of the United States for the Northern District of Ohio, adjudging that the Toledo, St. Louis and Western Railroad Company, as successor to the rights of Samuel Hunt, Receiver, is entitled to certain securities, and from certain interlocutory orders, including an order overruling the plea of Bache, the question arising as to the jurisdiction of the Circuit Court.

Statement of Facts.

Prior to 1886, the Toledo, Cincinnati and St. Louis Railroad Company, a consolidated corporation under the laws of Ohio, Indiana and Illinois, owned and operated a narrow gauge line of railway extending from Toledo, Ohio, to East St. Louis, Illinois. The road consisted of two divisions: the Toledo Division, extending from Toledo to Kokomo, Indiana, and the St. Louis Division, extending from Kokomo to East St. Louis. Each division was subject to divisional mortgages. Default having been made in the conditions of the divisional mortgage, proper actions were instituted for the foreclosure of these mortgages, and on December 30, 1885, the Toledo Division was sold to Sylvester H. Kneeland under decrees entered in the Circuit Court of the United States for the District of Indiana, the court of primary jurisdiction, and in the Circuit Court for the Northern District of Ohio, foreclosing the first mortgage thereon made by the Toledo, Delphos and Burlington Railway Company one of the constituent companies of said Toledo, Cincinnati and St. Louis Railroad Company, and on the same day, the St. Louis Division was also sold to Kneeland under decrees entered in the Circuit Court for the District of Indiana, the court of primary jurisdiction and in the Circuit Court for the Southern District of Illinois, foreclosing mortgages thereon made by the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois, another of said constituent companies (*Petition*, *Record*, pp. 2, 3).

After the usual provisions for the sale of the mortgaged railroad at not less than the upset price fixed by such decree, each decree provided that within twenty days after the confirmation of the sale thereunder, the purchaser should pay of the unpaid purchase money, a sum sufficient, taken with the cash payment to be made at the time of sale, to pay the costs, fees and allow-

ances and the claims and debts, including taxes, determined to be due and payable as court and receiver's indebtedness, excepting such final decrees upon said claims and debts as might have been superseded by proper appeal and supersedeas bonds, and, upon such payment, the purchaser should be let into the possession of the railroad and property purchased; that upon confirmation of the sale and the payment within twenty days thereafter of such part of the purchase money as was so required to be paid by him in cash, the masters should deliver to the purchaser a deed of conveyance of the mortgaged railroad and property; that said deed should contain an express stipulation reserving to the Court jurisdiction over the mortgaged property conveyed, with full authority and power, upon default of the purchaser in complying with the requirements of the decree respecting payment of the purchase money, to retake possession of the railroad and property conveyed, and forthwith sell the same *(Petition, Record,* p. 3).

Each of the decrees further provided that the residue of the purchase money not required to make these payments, should be paid by the purchaser from time to time upon the amounts adjudged by the court to be due and payable upon court and receiver's indebtedness, and to be prior to the lien of the mortgage foreclosed, until the entire purchase money should be exhausted, if it should require the entire purchase money to pay and discharge said court and receiver's indebtedness, and that, if any surplus be left after the payment of the court and receiver's indebtedness, the same should be distributed *pro rata* upon the coupons and bonds of said mortgage until the same should be fully paid *(Petition, Record,* p. 4*)*.

It was also provided that the purchaser or purchasers at the foreclosure sale reserved the right to appeal from any order or final decree made by the court decreeing the payment of claims adjudged to be payable as court and receiver's indebtedness, and to be prior in equity to the mortgage in suit *(Petition, Record,* p. 4).

Said sales were duly confirmed on February 5, 1886, and on March 10, 1886, by order of said Circuit Court for the District of Indiana, entered on that day, the form of the proposed masters' deed was approved and its delivery directed *(Petition, Record,* p. 4).

The order of confirmation contained similar provisions regarding the payment by the purchaser of the residue of the purchase price and reserving jurisdiction over the mortgaged property to be conveyed by the special masters (*Petition, Record,* p. 4).

Pursuant to said order and on March 10, 1886, a master's deed of the property was delivered to the purchaser. This deed contained proper provisions in accordance with said provisions of the decrees and of the order of confirmation *(Petition, Record,* pp. 4, 5).

Pending these foreclosures, an agreement of reorganization *(Petn. Exhibit A)* had been made under date of April 9th, 1884, between certain mortgage bondholders and creditors of said Toledo, Delphos and Burlington Railway Company and certain mortgage bondholders and creditors of said Toledo, Cincinnati and St. Louis Railroad Company of Indiana, and Illinois, and James M. Quigley, Charles W. Pierce, Halsey J. Boardman, John McNab and Charles T. Harbeck; and under the terms of this agreement, Quigley, Pierce and Boardman were constituted a reorganization committee of said St. Louis division bondholders, and Quigley, Harbeck and McNab were constituted a reorganization committee of said Toledo division bondholders. For Pierce, one Warren D. Hobbs was thereafter duly substituted *(Petition, Record,* p. 5; *Agreement,* pp. 14–25*)*.

The purchase of said division had been made by Kneeland under the terms of a memorandum dated December 18, 1885 (Exhibit B to Petition, pp. 25, 26), between Kneeland, and said Quigley as chairman of

said committees, pending the settlement of a formal contract with Kneeland.

Subsequent to said foreclosure sales, Kneeland entered into two agreements, each dated January 23, 1886, one with each of said reorganization committees *(Exhibits C and D, pp. 26, 33)*. The two agreements were, *mutatis mutandis*, substantially in the same form, and recited that the committee, party thereto, had determined, as the most available method to secure the best results, to transfer all its right, title and interest in the said division and to sell and transfer all of the first mortgage bonds held by such committee to Kneeland, upon the conditions therein stated.

The agreements provided generally that Kneeland should complete his purchase of the two divisions in accordance with the decrees of foreclosure, and proceed to form under the laws of Ohio, Indiana and Illinois, three railroad corporations, which, as soon as practicable, should be consolidated by him; and that the consolidated company should immediately issue:

(a) Six per cent. thirty-year first mortgage bonds to the amount of $20,000 per mile.

(b) Common stock to the amount of $25,000 per mile (*Record*, pp. 27–29).

Kneeland further undertook that the consolidated company should, as soon as formed, change its gauge to standard gauge, lay down steel rails, widen embankments and equip its road with necessary rolling stock. The first mortgage bonds and common stock of the consolidated company were, on the issue thereof, to be deposited with two trustees—one selected by Kneeland and one by the committees—and delivered by these trustees to Kneeland as the work of reconstruction and equipment should proceed (*Record*, pp. 28, 29).

The agreement further provided for the issue by the consolidated company of $5,805,000 four per cent. non-voting convertible preferred stock, of which $4,805,000 should be distributed at specified rates to the narrow-

gauge first mortgage bondholders, and the residue, $1,000,000 thereof, should be deposited in the hands of said trustees, to be delivered to Kneeland for use in compromising and settling claims and suits then existing and pending, or suits that might thereafter be brought against the lines of the consolidated company *(Record*, pp. 29, 30).

To carry these agreements into effect, Kneeland caused to be organized under the laws of Ohio, Indiana and Illinois, corporations respectively capitalized at $25,000 per mile of road, and on the organization of these companies, entered into a contract with each of them substantially in the same terms *(Exhibit E, pp. 41-46)*, by which he agreed to convey to such company the line of railroad and appurtenant property in the state in which such company had been incorporated, to cause the other two companies to consolidate therewith, and further agreed, in consideration of the securities to be issued by the consolidated company other than its common capital stock, that the consolidated company should broaden the gauge of its entire line from Toledo to East St. Louis and make the same a first-class standard-gauge railroad and equip the same accordingly. In consideration of said agreement on the part of Kneeland and of such conveyance to it of the specified line of railroad, the company agreed to deliver to Kneeland all its common capital stock (except the shares qualifying directors), and further agreed that the consolidated company should issue in full and complete payment of the purchase price of said railroad and property and for such reconstruction and equipment and for the purpose of exchange for the narrow gauge securities, and for the payment of underlying debts, certain rights of way, and other purposes, stock and first mortgage bonds of the character and to the amounts contemplated under said agreements of January 23, 1886 *(Record, pp. 5, 6)*.

Upon the execution of these contracts, Kneeland delivered to these constituent companies proper deeds of the railroad and appurtenant property to be conveyed by him, the consideration expressed for such conveyance being in each case the capital stock of the grantee, except the shares qualifying directors *(Record, p. 5)*.

On June 12th, 1886, these constituent companies entered into articles of consolidation, under which the Toledo, St. Louis and Kansas City Railroad Company was formed. The articles of consolidation provided for the issue of common stock, preferred stock and first mortgage bonds to the amounts and otherwise in accordance with the requirements of the contracts between Kneeland and the constituent companies, that the common stock $12,250,000, the aggregate of the capital stock of the constituent companies, should be issued in exchange, share for share, for the stock of the constituent companies, and that the directors and proper officers should have power to issue the preferred stock and first-mortgage bonds, and execute and deliver the first mortgage *(Record, pp. 6, 7)*.

Immediately upon such consolidation, the Toledo, St. Louis and Kansas City Railroad Company, by appropriate corporate proceedings, authorized the issue of its said preferred and common stock, and issued the same, and on June 19, 1886, executed its 9,800 thirty-year six per cent. first-mortgage bonds for $1,000 each, and to secure the payment of said bonds, on the same day executed and delivered to the American Loan and Trust Company and Joseph E. McDonald, its first mortgage on its line of railroad, equipment and property. Of these bonds, only 9,000 were ever issued.

Said first mortgage bonds and said common stock were, on issue, delivered to Isaac W. White and Robert G. Ingersoll, trustees appointed under the two agreements of January 23d, 1886 *(Petn., Exhibits C and D)*, and, from time to time thereafter, deliveries thereof were made by said trustees (*Record*, p. 7).

In the course of the reconstruction and equipment of the road, various controversies arose between Kneeland and the Railroad Company, and on June 1st, 1891, an agreement of settlement was made between them (*Petn., Exhibit F*). This agreement was conditional in form, and on June 3, 1891, the Railroad Company and Kneeland entered into a supplemental agreement by which the terms of settlement under the agreement of June 1, 1891, were declared to be absolute, the remedy of either party for a breach, to be in damages only. To both these agreements, each of the reorganization committees assented in writing (*Record*, p. 8).

At the time of the execution of these agreements of settlement, Kneeland had not completed payment of the purchase price of the narrow-gauge railroad and property purchased by him at said foreclosure sales, and there were then outstanding unpaid claims to the amount of $350,000 and upwards, which, under the terms of the foreclosure decrees, had been contested by Kneeland, and in respect of which a priority was claimed which, if finally established, entitled said claims to be paid out of the proceeds of said divisions, in priority to any distribution out of said proceeds of sale, to the holders of the narrow-gauge bonds secured by the mortgages foreclosed by the respective decrees under which said sales had been made; and by the agreement of June 1st, 1891, Kneeland in express terms admitted his liability to pay these claims (*Record, pp. 8, 48*).

By the agreement of settlement of June 1st, 1891, after providing for the disposition, in accordance therewith, of certain securities in the hands of the trustees under the agreement of January 23, 1886, the Railroad Company and Kneeland, the parties to said agreement of settlement, consented and requested said trustee to deliver all the rest and residue of said securities in their hands to the Farmer's Loan and Trust Company upon the execution by said trust company of a declaration of trust to the effect that it agreed

to receive and hold such securities in accordance with said trust, and that said trust company should thereupon hold the same in trust as security for the payment of all purchase money under said foreclosure sale due from said Kneeland, to the extent of all claims upon the proceeds of said sale which were prior to the claims of said first mortgage bonds of said Toledo, Delphos and Burlington Railway Company of Ohio and Indiana and said Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois, and upon the further trust to pay over and deliver said securities to said Kneeland as fast as *Kneeland* should pay said claims against said proceeds of the narrow gauge foreclosure sales, in the manner and at the rate in the agreement provided (*Record*, pp. 8, 9; 50). The agreement was silent as to the disposition to be made of these securities if Kneeland should not pay these claims.

In pursuance of the agreement of settlement, the Farmers' Loan and Trust Company executed at its foot a declaration of trust accordingly (*Petn. Exhibit F., Record, p. 53*), and the trustees under the agreements, of January 23, 1886, delivered to the trust company $132,000 first mortgage bonds, $500,000 preferred stock and $1,169,000 common stock. (*Record*, p. 9).

The trust company later received from Isaac W. White, one of the trustees under the agreements of January 23, 1886, to be held by it for the purposes of the agreement of settlement, $26,000 first mortgage bonds. These bonds were so delivered to the Trust Company by White in 1893 pursuant to an order of this Court in this cause under a settlement between White and the receiver in this action. (*Id.*).

All the securities at any time so delivered to the Trust Company have since been held by it and are now in its hands. (*Id.*).

In May, 1893, Stout and Purdy filed judgment creditors' bills against the Toledo, St. Louis and Kansas City Railroad Company in the Circuit Court for the

Northern District of Ohio and in the Circuit Courts for the District of Indiana and for the Southern District of Illinois, and under these bills a receiver of the railroad company and *of all its property* was duly appointed. (*Record*, pp. 9, 10).

On June 1, 1893, the Railroad Company made default in the payment of the interest on its first mortgage bonds, and in December, 1893, the Continental Trust Company and John M. Butler, the substituted trustees under the first mortgage, filed bills for the foreclosure of the first mortgage in the Circuit Court for the Northern District of Ohio and in the Circuit Courts for the District of Indiana and for the Southern District of Illinois. The same receiver was also appointed receiver under these bills of foreclosure, and the respective judgment creditors' actions consolidated with the actions of foreclosure under the title of the foreclosure (*Record*, p. 10).

Samuel Hunt, the petitioner, was, at the time of filing the petition, and had been since December 1, 1898, receiver of said railroad company and of all its property, duly appointed by each of said circuit courts in said causes (*Record*, p. 10).

Notwithstanding the agreement of settlement of June 1, 1891 (*Petn. Exhibit F*), Kneeland did not at any time pay any part of the residue of the purchase price of the narrow gauge lines, although claims to the amount of upwards of $350,000 represented by receivers' certificates issued in the course of the narrow gauge foreclosures, had been finally established as prior claims in accordance with said decrees of foreclosure, and the payment thereof by him as part of the unpaid residue of the purchase price, directed by proper orders. (*Record, p. 10*). The holders of these certificates thereupon in accordance with the provisions of the decrees of foreclosure, attempted to enforce payment out of the narrow gauge properties sold, *i. e.*, out of the property embraced in the first mortgage of the Toledo, St. Louis and Kansas City Railroad Company.

Thereafter, in February, 1898, R. F. B. Pierce, then receiver in the cause, presented a petition to the Circuit Court for the Northern District of Ohio setting up these facts, and by its order thereon that court found that there was due in respect of said prior claims, the amount of upwards of $500,000, and that the holders thereof were entitled to the payment out of the property embraced in the first mortgage of the Toledo, St. Louis and Kansas City Railroad Company in priority to said mortgage. The receiver was directed to take up said claims and decrees, and to pay therefor the amount thereof with interest, and for that purpose was authorized to apply out of the moneys arising from the operation of the railroad and property embraced in said first mortgage of said Railroad Company, the sum of $125,000. It was further provided by said order that for the residue of the amount necessary to take up said claims and judgments with interest, receiver's certificates be issued to the amount of $430,000, and such certificates were made a first and best lien upon all the property and assets of the Toledo, St. Louis and Kansas City Railroad Company of every nature and description wheresoever situated, then in the possession of this court and paramount and superior to the lien thereon of the first mortgage of said railroad company, then in process of foreclosure and to all liens subsequent thereto, and to all rights and claims therein of any party to this cause, or represented by any party, and that the same should be paid out of the proceeds of sale of the mortgaged premises, unless sooner paid, and might also be paid out of any funds arising from the operation of said mortgaged railroad and property available for that purpose. Similar orders were also entered in the Circuit Courts for the District of Indiana and for the Southern District of Illinois (*Record, pp.* 10, 11).

Accordingly, said receiver took up said claims and decrees and paid therefor the sum of $555,759.42, the amount thereof with interest. Said payment was

made by the receiver out of moneys in his hands arising from the operation of the mortgaged railroad and property, and by the issue of receiver's certificates to the amount of $430,000 (*Record, pp. 11, 12*).

Between July 1st, 1893, and February 1st, 1898, the receiver in the cause, out of moneys derived from the operation of the mortgaged premises, had also paid, under proper orders of court, in respect of said prior claims so taken up, interest aggregating upwards of $50,000 (*Record, p. 12*).

Of the receiver's certificates so issued, certificates to the amount of $400,000, together with interest on the entire issue from time to time outstanding, have been paid by the receiver out of the moneys in his hands arising from the operation of the mortgaged railroad and property; and by the degrees of foreclosure hereinafter mentioned, the receiver's certificates remaining outstanding were required to be paid out of the proceeds of sale of the property embraced in the first mortgage of the Toledo, St. Louis and Kansas City Railroad Company, unless sooner paid out of the funds arising from the operation of the mortgaged property (*Record, p. 12*).

On April 1, 1898, a decree was entered in the foreclosure suit foreclosing said first mortgage of said Railroad Company and directing a sale of the mortgaged premises. Decrees of similar effect were thereupon entered in said actions pending in the District of Indiana and in the Southern District of Illinois (*Record, p. 12*).

Said decree of foreclosure having been affirmed by the Circuit Court of Appeals, on appeals prosecuted to said court by Bache and Kneeland among others, the premises and property adjudged to be subject to the lien of said first mortgage, were, in pursuance of said decrees of foreclosure, sold on the 27th day of March, 1900, to Morton S. Paton and Richard B. Hartshorne for the sum of $12,200,000, and said sale was, by order of the Circuit Court for the Northern

District of Ohio, entered April 18, 1900, by order of the Circuit Court for the district of Indiana, entered April 23, 1900, and by order of the Circuit Court for the Southern District of Illinois, entered April 23, 1900, duly confirmed and made absolute (*Record, pp. 12, 13*).

At the time of sale, there was due in respect of said first mortgage bonds and coupons of said Toledo, St. Louis and Kansas City Railroad Company, approximately, the sum of $13,500,000, and the dividend to which any bond with the coupon maturing June 1, 1893, and subsequent coupons, will be entitled out of the proceeds of sale, cannot, therefore, exceed the sum of $1,260 (*Record, p. 13*).

By these decrees of foreclosure and sale, it is adjudged that the first mortgage of said railroad company is a lien upon the railroad and property of said railroad company, whether owned at the date of the mortgage foreclosed or thereafter acquired, and is a lien upon all moneys, profits and income derived by any receiver in said causes from the operation of said mortgaged railroad and property. All said amounts, therefore, which have been so paid in taking up said prior claims and decrees, have been so paid or must be paid either out of said mortgaged premises or out of moneys derived by the receiver from the management and operation thereof; *i. e.*, out of property otherwise applicable to the payment of the first mortgage bonds (*Record, p. 13; Supplemental Record pp. 6, 7*).

On April 18, 1900, an order was made confirming the sale (*Order, Supplemental Record, pp. 16–19*). The order, among other things, provided that "the distribution of the proceeds of sale and all allowances and compensation are reserved for future order" (*Supplemental Record, p. 18*).

On or about the 28th day of May, 1900, said Samuel Hunt, as receiver in this cause, filed his petition in the Circuit Court for the Northern District

of Ohio, in which, after setting out these facts, he prayed a decree that the petitioner is entitled out of said first mortgage bonds and said preferred stock and said common stock in the hands of said Farmers' Loan and Trust Company to be reimbursed all said amounts, with interest thereon from the

Messrs. Paton and Hartshorne assigned their bid to James N. Wallace on June 5, 1900, and thereafter an order was made upon the petition of Wallace, making him a party to the cause and dismissing Paton and Hartshorne (*Record*, pp. 68–71).

Thereafter the Toledo, St. Louis and Western Railroad Company was incorporated and acquired all the property which had been sold under the decree, including all the rights of the Receiver; and by an order entered July 28, 1900, that company was made a party to the cause and was substituted as petitioner in place of Hunt, Receiver (*Record*, pp. 71–75).

On July 28, 1900, Jules S. Bache, appearing specially for the purpose, filed a plea to the jurisdiction of the Circuit Court of the United States for the Northern District of Ohio, both of his person and of the subject matter of the petition. The plea with the exhibits attached appear in the Record at pages 76 to 93 inclusive.

The plea is based on the following grounds:

(*a*) The residence and citizenship of Bache, and the residence and citizenship of other respondents to the petition, within the State of New York.

(*b*) The pendency in the Supreme Court of the State of New York of an action instituted, prior to the filing of Hunt's petition, by Bache as a judgment creditor of Kneeland, against the Toledo, St. Louis and Kansas City Railroad Company, Kneeland and the Farmers' Loan and Trust Company, in which the last mentioned company had been appointed Receiver

of the securities forming the subject of the Hunt petition, on May 28, 1900, the same day on which the Hunt petition was filed.

(*c*) The insufficiency of the method of service upon Bache of the order to plead to the petition.

The plea came on for hearing before Judge THOMPSON, sitting in the Northern District of Ohio, and was overruled (*Opinion: Record, pp.* 93-97, *Order*, p. 97).

An order was entered on December 21, 1901, taking the petition as confessed by all the respondents other than the Continental Trust Company, which had filed an answer admitting the allegations of the petition (*Record*, p. 75); Bache; and Paton and Hartshorne, who had been dismissed from the case (*Record*, p. 98).

Bache never answered nor pleaded otherwise than by the plea which had been overruled, and an order was entered on April 7th, 1902, taking the petition as confessed as against him (*Record*, p. 100).

Thereafter, on December 4, 1902, an order was made that the Toledo, St. Louis and Western Railroad Company, as successor to the rights of the Receiver and his predecessors, was entitled out of the first mortgage bonds and other securities in the hands of the Farmers' Loan and Trust Company to be reimbursed all the amounts, with interest, which the Receivers had paid in respect to the prior claims; that the securities should be delivered to the Railroad Company within thirty days; and that in default thereof they should stand canceled, and as of no further force or effect as obligations of the Toledo, St. Louis and Kansas City Railroad Company (*Order*, *Record*, pp. 103, 104).

On the same day Bache prayed an appeal from said order, and also from the following orders (styled interlocutory orders):

(*a*) The order of May 31, 1900, requiring certain respondents to plead to the petition;

(*b*) The order of June 9, 1900, requring the Farmers' Loan and Trust Company to plead ;

(*c*) The order of July 28, 1900, substituting the Toledo, St. Louis and Western Railroad Company in place of Hunt, Receiver ;

(*d*) The order of December 14, 1901, overruling the plea to the jurisdiction ;

(*e*) The order of April 7, 1902, taking the petition as confessed as against Bache ;

and asked that the appeal be allowed on the ground that the jurisdiction of the Court below was in issue (*Record*, pp. 104, 105). At the same time he filed assignment of errors (Record, pp. 108–112).

An order was entered allowing the appeal (*Record*, pp. 112, 113). The respondents other than Bache, were requested to join in the appeal, but have not complied with the request (*Record*, pp. 112–116).

ARGUMENT.

FIRST. The Circuit Court of the United States for the Northern District of Ohio, had full jurisdiction over the subject matter of the petition.

I. All the allegations of the petition, except so far as they are contradicted by the plea, must be taken as true.

1 Daniel's Chancery Practice, 603.
Farley vs. Kittson, 120 U. S., 303.
Hilton vs. Gayot, 32 Fed. Rep., 251.
Story's Eq. Pl., 10th Ed., 584.

II. The proceeding is not an original proceeding, but ancillary and dependent, supplementary to the original suit out of which it arose.

Preliminarily to the consideration of the legal principles and authorities governing the plea, it may be well to state succinctly the legal relations of the parties:

(*a*) By the terms of his purchase of the two divisions of the narrow gauge lines, Kneeland, as purchaser, became liable to pay and discharge the pending claims as part of his bid, as their amount and right to priority over the mortgages foreclosed should be determined by the Court.

(*b*) This obligation on the part of Kneeland was secured by the reservation by the court of jurisdiction over the narrow gauge properties and of a power of resale to enforce payment.

(*c*) This reservation of jurisdiction and power of sale followed the narrow gauge properties; and appearing in the direct chain of title, every purchaser from Kneeland, the constituent companies, the consolidated corporation, the trustees of the first mortgage, and through them to the holders of the first mortgage bonds, took with notice, and their rights were subordinated thereto.

(*d*) The agreements of January 23, 1886, under which the reconstruction of the narrow gauge lines was undertaken by Kneeland, recognized this liability on the part of Kneeland, and for the considration to be received by him thereunder, he undertook to discharge this liability, and, by such discharge, to relieve the properties from this burden.

(*e*) Accordingly the mortgage bonds of the Toledo, St. Louis and Kansas City Railroad Company, are expressed to be first mortgage bonds, and to be secured by a first lien on the property embraced therein and in part to be issued to discharge these claims. The appellant has not made the mortgage a part of the printed record, although it is specifically referred to in the petition

(p. 7), but this fact is sufficiently shown by the allegation on page 6 and from Exhibit E, page 45.

(f) As a necessary consequence, holders of first mortgage bonds, whether directly or through the trustees of the first mortgage, were interested in this obligation on the part of Kneeland, since the extent and priority of their security were directly dependent on the discharge by him of this liability.

(g) The agreement of settlement of June 1, 1891, was, therefore, an agreement for the benefit of the holders of the first mortgage bonds, and one in the fulfillment of which, and in the security for the fulfillment of which, they had a direct interest.

The agreements of settlement of June, 1891, were not agreements merely between the railroad company and a defaulting contractor, adjusting in whole or in part the differences between them. They were an adjustment of the relations arising out of the reorganization, a settlement of the obligations incurred in the reorganization under the agreements of January 23, 1886. The action contemplated was in order to effectuate the agreements of January 23, 1886, by securing the fulfillment by the contractor of the obligations into which he had entered and on the fulfillment of which the first mortgage bonds then outstanding had been issued as such.

(h) That this was the contemplation of all the parties is made clear by the form which the settlement assumed and by the joinder in the settlement of the narrow-gauge reorganization committees as parties.

(i) It is also clear that, while the first mortgage bonds remained in the hands of the trustees under the agreements of January 23, 1886, they were not enforceable against the Railroad Company. It is equally clear that, by their delivery under the terms of the agreements of settlement of June, 1891, to the Farmers' Loan and Trust Company, they did not become enforceable obligations of

the Railroad Company until the discharge by Kneeland of the old narrow gauge indebtedness and their delivery by the Trust Company to him against such discharge. They were in reality treasury bonds of the Railroad Company.

(j) These first mortgage bonds, therefore, even although treated as issued by the Railroad Company, did not, by their delivery to the Farmers' Loan and Trust Company, pass to Kneeland save on compliance by him with the precedent conditions of the trust then declared concerning them. They were never assets or property of Kneeland. He did not deposit them with the Trust Company; he was not entitled to them before their delivery to the Trust Company; he has never become entitled to them since their delivery to the Trust Company. Prior to June, 1891, he was entitled to earn them; subsequent to June, 1891, he was entitled to receive them on payment of the consideration specified—*i. e.*, the discharge of the narrow gauge prior claims. But he neither earned them prior to their delivery to the Trust Company, nor paid the consideration for them subsequent to their delivery to the Trust Company. They never vested in him at any time or in any manner, and until they should vest in him under the agreements of settlement, they were bonds to which the Railroad Company was entitled and which were its property.

The relations of the parties in 1898 were therefore these:

The property embraced in the first mortgage of the Toledo, St. Louis and Kansas City Railroad Company's mortgage was subject to a lien prior to the lien thereon of the first mortgage. For the discharge of that lien in exoneration of the first mortgage bonds, Kneeland personally was under a threefold obligation; to the Court, by reason of the terms of his original purchase; to the reorganization com-

mittees, by reason of the agreements of January 23, 1886; and to the railroad company, under the agreements of settlement of June, 1891, as well as under his agreements with its constituent companies.

To secure the discharge by Kneeland of these prior claims, the Farmers' Loan and Trust Company held the bonds in question, for delivery to Kneeland only as and to the extent that he should meet and discharge these prior claims. Kneeland could become entitled to these bonds, therefore, only as and to the extent that he himself should meet and discharge these prior claims and thereby relieve from the burden of the lien of these prior claims, the lien of the holders of the first mortgage bonds on the property embraced in the first mortgage.

But these prior claims being absolutely prior in right to the first mortgage of the Toledo, St. Louis and Kansas City Railroad Company, the rights of the holders of these claims against the property embraced in the first mortgage, were absolute. The fact that a fund for their payment had been created did not affect the rights of the holders against the property, and they obtained the enforcement of those rights.

These prior claims were paid out of moneys in the hands of the receiver in the suit brought to foreclose the Toledo, St. Louis and Kansas City first mortgage —in which cause this petition was filed—derived from the operation of the road, directly or through the receivers' certificates issued to take them up, or out of the corpus of the property embraced in the first mortgage of the Toledo, St. Louis and Kansas City Railroad Company, foreclosed in this action. Whichever the source of payment, it was out of property embraced in the first mortgage of the Railroad Company; the fund out of which the bondholders were to be paid; in other words, out of the very property which by the agreements of settlement of June, 1891, it was intended to protect. On that payment, therefore, the conditions of the agreements of June, 1891, on which these bonds might

become deliverable to Kneeland, became incapable of fulfillment, and the Receiver became entitled to these bonds as assets of the Railroad Company. The agreements of June 1, 1891, declare no trust on the part of the Trust Company with respect to these bonds, in the event of Kneeland's failure to pay these prior claims, and when the conditions on which they might become deliverable to him became impossible of fulfillment, the trust ceased, and the receiver became absolutely entitled to these bonds.

It was, however, suggested on the argument below that because the plea contains the statement that the allegations of the complaint in the New York action attached to the plea as an exhibit, were true, and because among these allegations was one to the effect that these bonds were never assets of the Railroad Company, it must for the purposes of this argument be assumed that the bonds were never assets of the Railroad Company. The suggestion hardly calls for serious consideration. The petition sets out the entire chain of title of the Railroad Company to these bonds, and this is admitted by the plea, so that, in any event, this statement in the plea is a mere statement of a conclusion of law and was not admitted by setting down the plea for argument.

By the decree of foreclosure of the first mortgage of the T., St. L. & K. C. R. R. Co., that mortgage is decreed to be a valid and subsisting first lien, among other things, on

> "all leases and leasehold interests, contracts, choses in action, including bills receivable, traffic balances and claims of every character, * * owned by said respondent railroad company at the date of the execution of said first mortgage, or which it has since at any time acquired; * * all other property, rights to property or interests in property, of whatever description, owned by the respondent railroad company at the date of the execution of its said first mortgage, or thereafter at

> any time by it acquired or held in trust for it or for its benefit in extension of or appurtenant or incidental to the railroad and property above described or described in and covered by said first mortgage; * * * and all other property, real, personal and mixed, and interests in property and all choses in action at any time prior to the delivery to the purchasers of the property sold under this decree, acquired by any receiver in this cause, or becoming vested in any receiver in this cause, or held in trust for him or for his benefit, and all moneys, profits and income derived, or at any time hereafter to be derived, by any receiver in this cause from the operation of the property herein adjudged to be subject to said first mortgage" *(see Supplemental Record, pp. 5-7).*

The decree of foreclosure also contains the usual provisions permitting the purchasers to use in making payment of the purchase price, first mortgage bonds taken at a price equivalent to the cash dividend to which they would be entitled out of the net proceeds of sale.

Prior to the filing of the petition of Hunt, Receiver, and on April 18, 1900, the order of confirmation of sale was made and entered *(see Supplemental Record, p. 16).*

It provides, among other things, "*that the distribution of the proceeds of sale* and all allowances and compensation *are reserved for future order (See Opinion, p. 96; Supplemental Record, p. 18).*

It is obvious that the court below was the only court which could exercise the power to distribute the fund.

That court necessarily had the power to determine two questions; certainly as regards all parties to the cause: *i. e.*

> (1) What property was sold under its decree.
>
> (2) What cash dividend was distributable to the first mortgage bonds, and, as a necessary element in this, what bonds were entitled to share in the net proceeds of sale.

Finally, the first mortgage bonds were not only in default and overdue for upward of six years, but were merged in the decree of foreclosure. They became merely evidences of the right to share in the proceeds of sale, and that right it was not only the province of the Circuit Court to determine, but its exclusive province (see Opinion, p. 96).

III. As an ancillary and dependent proceeding, supplementary to the original suit out of which it arose, the proceeding was properly maintainable without reference to the citizenship or residence of the parties to the proceeding.

Freeman vs. Howe, 24 How., 450.

It may be proper to cite at some length the decisions of this court and of other courts bearing upon the proposition just stated.

Minnesota Co. vs. St. Paul Co., 2 Wall., 609:

> "The question is not whether the proceeding is supplemental and ancillary or is independent and original in the sense of the rules of equity pleading, but whether it is supplemental and ancillary or is to be considered entirely new and original in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the State courts. No one, for instance, would hesitate to say that according to the English Chancery practice a bill to enjoin a judgment at law is an original bill in the chancery sense of the word. Yet this court has decided many times that when a bill is filed in the Circuit Court to enjoin a judgment of that court, it is not to be considered as an original bill but as a continuation of the proceeding at law, so much so that the court will proceed in the injunction suit without actual service of the subpœna on the defendant and though he be a citizen of another State if he were a party to the judgment."

See, also, the very full discussion of the principles and of the cases in

Krippendorf vs. Hyde, 110 U. S., 276.

Rouse vs. Letcher, 156 U. S., 47:

"It is well settled that where property is in the actual possession of a court this draws to it the right to decide upon conflicting claims to its ultimate possession and control *(Minnesota Co. vs. St. Paul Co., 2 Wall., 609; Morgan Co. vs. I. C. Ry. Co., 137 U. S., 171, 201);* and since where assets are in the course of administration, all persons entitled to participate, may come in under the jurisdiction acquired between the original parties by ancillary or supplemental proceedings, even though jurisdiction would be lacking if such proceedings had been originally and independently prosecuted *(Stewart vs. Dunham, 115 U. S., 61, 64; Richmond vs. Irons, 121 U. S., 27, 52),* and since, where jurisdiction would not obtain in an independent suit, an intervening proceeding may nevertheless be maintained as ancillary and supplemental under jurisdiction already subsisting, such proceeding is to be regarded in that aspect, even in cases where the Circuit Court might have had jurisdiction of an independent action. * * * We think the use of the words 'suit or controversy' in the sixth section does not affect the conclusion. If the word controversy added anything to the comprehensiveness of the section, the fact remains that the exercise of the power of disposition over this intervention, whether styled suit or controversy, was the exercise of power invoked at the institution of the main suit, and is to that point of time that the inquiry as to jurisdiction must necessarily be referred *(C. C. Mining Co. vs. Turck, 150 U. S., 138).*"

Gregory vs. Van Ee, 160 U. S., 643 :

"In *Rouse vs. Letcher*, 156 U. S., 47, we held that, if the decree of a Circuit Court of Appeals is final under the sixth section of the Judiciary act of March 3, 1891, a decree upon an intervention in the same suit must be regarded as equally so because the intervention is entertained in virtue of jurisdiction in the Circuit Court already subsisting. It was pointed out that, where property is in the actual possession of the Circuit Court, this draws to it the right to decide upon conflicting claims for its ultimate possession and control, and that where assets are in the course of administration, all persons entitled to participate may come in under the jurisdiction acquired between the original parties by ancillary or supplemental proceedings, even though jurisdiction in the Circuit Court would be lacking if such proceedings had been independently prosecuted; that the exercise of the power of disposition by a Circuit Court of the United States over such an intervention is the exercise of a power invoked at the institution of the main suit, and that it is to that point of time that the inquiry as to the jurisdiction of the Circuit Court must necessarily be referred. Therefore, that, if the decree in the main suit were final, decrees in accessory and subordinate proceedings would be also final, and appeals therefrom could not be sustained.

"The Circuit Courts of the United States have cognizance of suits as provided by the acts of Congress, and when their jurisdiction as Federal courts has attached, they possess and exercise all the powers of courts of superior general jurisdiction. Accordingly they entertain and dispose of interventions and the like on familiar and recognized principles of general law and practice, but the ground on which their jurisdiction as courts of the United States rests is to be found in the

statutes, and to that source must always be attributed."

Porter vs. Sabin, 149 U. S., 473:

"When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court and the court itself holds and administers the estate, through the receiver as its officer for the benefit of those whom the court shall ultimately adjudge to be entitled to it (citing with other cases, 136 U. S., 223; 136 U. S., 287, 297).

"It is for that court in its discretion to decide whether it will determine for itself all claims *for* or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation, the court may permit to be put in suit in another tribunal against the receiver or may reserve to itself the determination of and no suit unless expressly authorized by statute can be brought against the receiver without the permission of the court which appointed him.

"The reasons are yet stronger for not allowing a suit against a receiver appointed by state court, to be maintained or the administration by that court of the estate to be interfered with, by a court of the United States, deriving its authority from another government though exercising jurisdiction over the same territory. The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all rights of action except so far as already lawfully disposed of under orders of that court remains in

its custody to be administered and distributed by it. Until the administration of the estate has been completed and the receivership terminated, no court of the one government can by collateral suit assume to deal with rights of property or of action constituting part of the estate within the exclusive jurisdiction and control of the rights of the other *(Wiswall vs. Sampson, 14 How., 52, 65 ; Ball vs. Phipps, 14 How., 368, 374 ; Barton vs. Benbow, 104 U. S., 126 ; Williams vs. Benedict, 8 How., 107 ; Pullman vs. Osborne, 17 How., 471 ; Peoples Bank vs. Calhoun, 102 U. S., 256 ; Herdritter vs. Elizabeth Oil Cloth Co., 112 U. S., 294 ; In re Tyler, 149 U. S., 164).*"

White vs. Ewing, 159 U. S., 37 :

" The Circuit Court obtained jurisdiction over the Cardiff Coal and Iron Co. by the filing of the original bill by Bosworth, a citizen of Massachusetts, and by the appointment of a receiver, and any suit by or against such receiver in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit and as cognizable in the Circuit Court, regardless either of the citizenship of the parties or of the amount in controversy.

" Indeed, it was conceded that where an insolvent corporation is placed in the hands of a receiver of the Circuit Court, such appointment draws to the jurisdiction of that court the control of its assets so far as persons having claims to participate in the distribution of such assets are concerned, and that parties must go into that court to assert their rights, prove their demands and receive whatever may be due them, or their share or interest in the estate. But it is insisted that there is a distinction between cases where parties are brought before the court for the purpose of the payment to

them of claims which they may hold against the estate and cases where it is sought to recover of them claims which the receiver insists they owe the estate; that the receiver stands in the shoes of the company and has no higher rights than the corporation, and, having sued for less than the jurisdictional amounts, that as to them the cases must be dismissed.

"This position is entirely correct so far as the right of the receiver to recover upon the merits is concerned, but it has no bearing whatever upon the question of the jurisdiction of the court to pass upon such merits." * * *

"In this case, however, the court proceeds upon its own authority to collect the assets of an estate with the administration of which it is charged, and if the Receiver in such cases appears as a party to the suit it is only because he represents the Court in its inherent power to wind up the estate of an insolvent corporation over which it has by original bill obtained jurisdiction. In this particular, the jurisdiction of the Circuit Court does not differ materially from that of the District Court in bankruptcy, the right of which to collect the assets of a bankrupt estate we do not understand ever to have been doubted. There is just as much reason for questioning the jurisdiction of the court in this case upon the ground of want of diverse citizenship as upon the ground that the requisite amount is not involved."

Gableman vs. P. D. & E., 101 Fed. Rep., 1:

"The decision in this case *(White vs. Ewing,* 159 U. S., 36) went upon the principal that suits ancilliary to the receivership fall to the jurisdiction of the court appointing the receiver, in other words, that the diversity of citizenship that gave to the United States Circuit Court jurisdiction in the original case was carried over to all strictly ancilliary suits. This has frequently been decided

since in other cases. *Krippendorf vs. Hyde*, 110 U. S., 276; *Pacific R. Co., of Mo., vs. Mis. Pac. Ry. Co.*, 111 U. S., 505.) * * *

"The case now under consideration is not, properly speaking, ancillary to the case brought in the Circuit Court of the Southern District of Illinois, in which the receiver was appointed. It does not aid or supplement the purposes of that suit. It is not brought by the receiver, but against him. It is not intended directly to increase or diminish, or in any way affect, the assets intrusted to him, whatever may be its incidental effect."

The complaint in the action instituted by Bache in the Supreme Court of the State of New York is attached to the plea as an exhibit, and it is worthy of remark that the plaintiff in that action who is a party to this cause and bound by the decrees therein, has carefully avoided making defendant in the New York action, any person who has, or might fairly be assumed to have, a real interest in the securities in question. The sole parties defendant are the Railroad Company, which had been for more than seven years in the hands of a receiver; Kneeland, who is in default in all his obligations, and the Farmers' Loan and Trust Co., which, by reason of the impossibility of the fulfillment by Kneeland of the conditions on which the bonds might become deliverable to him, had become a mere depositary.

The pendency of the suit in New York has no bearing upon the question before the court. Bache may bring that suit to judgment and procure a sale of the deposited securities; but the purchaser would of course take them subject to the trust under which the petitioner's claim is asserted, and the matter to be determined, whether or not they would be entitled to share in the proceeds of sale, would eventually come before the Circuit Court for the Northern District of Ohio to be disposed of by that court.

IV. The procedure by petition was regular and proper.

(*a*) It was unnecessary to file a bill, whether that bill be an original dependent bill, supplemental bill or cross-bill. The questions presented by the petition may properly be raised by petition in the nature of a petition *pro interesse suo*.

Krippendorf vs. Hyde, 110 U. S., 276.

(*b*) All the parties to the petition were parties to the foreclosure action with the exception of the Farmers' Loan and Trust Company, which is a mere stakeholder without interest of any kind in the subject matter, except possibly as to its charges for services as trustee which the person receiving the securities would be required to pay as an incident to the delivery. It does not appear, however, that there are any such charges.

It is deemed unnecessary to discuss *seriatim* the twenty-two assignments of error. The claim that the court below was without jurisdiction because the bonds were not physically within the District; that because a decree of foreclosure had been entered the court below could entertain no petition affecting the fund; that the court could not look at its own record in the suit in which the petition was filed (Assignments, 16 & 17, pages 116, 117), are utterly without merit.

SECOND. The Circuit Court had jurisdiction of the person of the appellant.

If that court had jurisdiction to entertain this proceeding as ancillary to and dependent on the foreclosure action, the plea, so far as it attempted to raise questions based on the citizenship or residence of the respondents, was properly overruled; and the sole question was as to the regularity of the service upon Bache of the order to plead to the petition.

I. Bache cannot raise by plea or otherwise the sufficiency of the service on other respondents. That is personal to them.

II. All the parties to the petition were parties to the foreclosure suit except the Farmers' Loan and Trust Company (see Decree of Foreclosure, Additional Record, p.), which was a mere depositary without interest in the subject matter. It will be time to deal with that company when it undertakes to assert any rights by virtue of its possession of the bonds.

Bache, as a junior encumbrancer, still remains a party to the suit, and was before the court for all the purposes of distribution of the proceeds of the sale of the mortgaged property. The fund is in the Circuit Court and that court had the right to direct its disposition (see *Opinion*, pp. 96, 97).

III. The procedure by petition *pro interesse suo* being regular (*Krippendorf vs. Hyde, supra*), the method of service properly followed the English Chancery practice in cases of this character.

A subpœna does not issue upon an intervening petition, or petition *pro interesse suo*, but on application to the court leave is given by order to file the petition, and the respondents are directed by order to plead thereto within the time limited. This has been the general and settled practice.

Daniel, Ch. Pr., Ch. XXVI., § 7, p. 1057:

> "This inquiry is called an examination *pro interesse suo*, and an order for such an examination may be obtained by a party interested. * * *
>
> "The application for the order is usually made by motion, supported by affidavit showing the facts under which the claim arises."

IV. The proper procedure of Bache to raise any question of the sufficiency of the mode of service upon him of the order to plead to the petition was by motion to set aside, which he never made.

THIRD. The order substituting Wallace and the Toledo, St. Louis and Western Railroad Company as assigns of the purchasers were regular and proper.

It is elementary law that the purchaser at a foreclosure sale, and his assigns, become in effect parties to the cause for all purposes connected with the decree and its enforcement, and the orders merely made the record. As he subjects himself by his purchase to the jurisdiction of the court, in so far as the purchase itself is concerned, and can be compelled to perform his agreement specifically, he acquires a right to appear and to claim such relief as he is entitled to by the rules of equity procedure.

Short's Law of Railway Bonds and Mortgages, 830.
Blossom vs. Milwaukee, &c., R. R., 1 Wallace, 655.

FOURTH. The orders appealed from should be affirmed.

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